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IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

NO. 1539

ROBERT DAVID ZMUDA, Petitioner

v.

UNITED STATES OF AMERICA, Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit, entered in the above entitled case on March 10, 1970, affirming the judgment of the District Court as to conviction for failure to report for an Armed Forces Physical Examination.

OPINIONS BELOW

The decision of the Court of Appeals is unreported. It is set out in the Appendix, *infra,* at pp. 11-20. The District Court did not issue a decision.

JURISDICTION

The judgment of the Court of Appeals was entered on March 10, 1970. On April 9, 1970, Mr. Justice Byron R. White entered an Order extending until May 9, 1970, the time for filing this petition for certiorari. Jurisdiction is conferred on this Court by 28 U. S. C. §1254(1).

QUESTION PRESENTED

Petitioner was classified 1-A in January, 1968, at which time he was 18 years old. He returned his draft card with a note to the government on May 27, 1968, to reaffirm his position previously stated to the Board that he was a conscientious objector to war. The next day the Executive Secretary of the local board mailed him an Order to Report for Armed Forces Physical Examination. He was subsequently convicted of failing to report for this physical examination. Under these circumstances, does the Order to Report for Armed Forces Physical Examination issued to petitioner immediately upon his sending his draft card and notice respecting conscientious objection to war to the local board violate the due process clause of the Fifth Amendment, the Sixth Amendment, the Military Selective Service Act of 1967, as amended, and the Selective Service Regulations?

STATUTES AND REGULATIONS INVOLVED

Military Selective Service Act of 1967, Sec. 12(a); 50 U.S.C.A. Appendix Section 462(a) is set out in the Appendix, *infra*, pp. 21-22.

Selective Service Regulation 1628.10; 32 CFR Sec. 1628.10, is set out in the Appendix, *infra*, p. 22.

STATEMENT OF THE CASE

Petitioner was indicted November 13, 1968, in the United States District Court for the Western District of Pennsylvania, on two alleged violations of 50 U.S.C.A. Appendix Section 462(a) for failing to submit to an Armed Forces Physical Examination, and for failing to report for and submit to induction into the Armed Forces of the United States. Petitioner appeared and posted $500 own recognizance bond in the Office of the Clerk of the Court. Petitioner pleaded not guilty and a jury trial was had before the Honorable Edward Dumbauld, Judge of the United States District Court for the Western District of Pennsylvania on January 16 through January 20, 1969. The jury returned a verdict of guilty upon both counts. On March 20, 1969, Judge Dumbauld sentenced the petitioner to be committed for a period of four (4) years in a penal type institution as to each count, the sentences to run concurrently. (Sentence was for a period of four (4) years as to each count, not for three years as stated in a typographical error on the first page of the Opinion of the Third Circuit Court of Appeals.)

Appeal was taken to the United States Court of Appeals for the Third Circuit. On March 10, 1970, the Third Circuit Court of Appeals entered judgment reversing the judgment of the District Court as to conviction for failure to report for induction; but affirming the judgment of the District Court as to conviction for failure to report for an Armed Forces Physical Examination. Petitioner then filed this Petition with respect to the remaining conviction for failure to report for an Armed Forces Physical Examination. (The original $500 own recognizance bond continues.)

Petitioner became 18 years of age on May 5, 1967. He filed SSS Form 100, Classification Questionnaire, with Local Board No. 11, Federal Building, 1000 Liberty Avenue, Pittsburgh, Pennsylvania, 15222, and then and there made a claim to be a conscientious objector by signing in the designated place on the form to that effect. (Selective Service file, p. 7)* On July 24, 1967, the local board received from him a completed SSS Form 150, Special Form for Conscientious Objector, in which he registered his claim for exemption as a conscientious objector (Selective Service file, pp. 13-17). By date of mailing, January 23, 1968, the Local Board classified petitioner in Class 1-A (Selective Service file, p. 29).

On May 27, 1968, the petitioner wrote a handwritten note to the draft board expressing his disappointment that he had not been granted a conscientious objector classification and enclosing his draft card or classification card. The letter said:

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*References to the Record refer to the Appendix in the Third Circuit Appeal, filed with this Petition.

Letter of May 27, 1968

"Dear Mildred Tallman:

I see no reason why a C.O. was not given to me.

Alas, I tried for VISTA, and was told to wait for a year.

Hence, I am ready for jail.

Tell me of patriotism, and I will take words from the lips of Christ!

Now you come and get me.

Robert Zmuda

P.S. Enclosed please find one wrinkled (I was tempted to burn it) card." (Selective Service file, p. 30).

On May 28, 1968, an order was mailed to Zmuda to report for Armed Forces Physical Examination on June 19, 1968. Zmuda failed to comply with the order but mailed the following poem to the board:

"O Mildred, was that cute!
One is almost inspired
To write a poem about it—
I mean, the order, as amended,
Signed by you
Telling me to report for a physical.
I mean, how many draft cards
Does one possess
To send in to you?
And how charming of you
Not to supply me
With an envelope and stamp—
You know, I'm still waiting,
And you know, it will be
Quite a rare occasion

For me to shake your hand —
The hand that has so much
(indirect) blood on it
Seriously, though, Mildred,
I think you should examine
Your conscience
Before you go stamping and signing
Your name to all the nameless
Thousands of pieces of mail
That leave that place — the indirect
Beginning of the command
To Kill Or Be Killed

Love to you anyway,
Robert Zmuda

P.S. How do you get around the Fifth Commandment?"

(Selective Service file, p. 36)

On July 18, 1968 Zmuda was declared delinquent by the Board for failing to report for the Armed Forces Physical Examination.

As noted above, the Order to Zmuda to report for Armed Forces Physical Examination was sent on the very next day after the board received his letter of May 27, 1968. With respect to the Order to Report for Armed Forces Physical Examination, Mrs. Mildred Tallman, the Executive Secretary of the local board, testified at the trial:

"*By Mr. Kerr*:

Q. Mrs. Tallman, you referred to a letter in Robert Zmuda's handwriting received by the Board on May 27, 1968, and then you referred to a form

sent out by the Board to report for a physical examination. When was that form sent out? What date?

A. May 28th.

Q. So, you got the letter on the 27th and ordered him to report for a physical on the 28th?

A. Yes, sir.

Q. Who made that decision?

A. The boy was available for a physical examination, and it is the procedure to send him for a physical examination.

Q. Did the Board decide to call him for the physical? Did the Board meet and decide to call him?

A. When the Board classified him 1-A, it indicated that he was to be called for a physical examination in turn.

Q. Did the Board meet on May 27th and read the letter?

A. No, sir.

Q. And then order him for a physical on the next day?

A. No, sir.

Q. Who did that?

A. It is the function of the clerk to send out the order for a physical examination.

Q. Okay. So, you did it?

A. Yes, sir.

Q. And, you did it the very next day?

A. Yes, sir.

Q. After you received this letter?

A. Yes, sir." (Transcript, pp. 78-79).

There was no further examination of Mrs. Tallman on this point on redirect examination.

REASON FOR GRANTING THE WRIT

Certiorari should be granted in this case to determine whether an administrative clerk in the Selective Service System may use an Order to Report for Armed Forces Physical Examinations as a disciplinary or vindicative measure.

The issue in this case is simply the validity of an Order to Report for Armed Forces Physical Examination by an Executive Secretary of a local board without any consultation with the members of the local board when the Order was issued the day following a provocative note and the return of a registration card by a registrant just then turned 19 years of age.

Selective Service Regulation 1628.10 relates "Who Will Be Examined" prior to induction. "Every registrant, before he is ordered to report for induction, ..." Apparently, the day after she received the returned card from this registrant the clerk took the first step toward punitive induction. This action would seem to be in accordance with Selective Service memoranda (the October 24 and 26, 1967 "Hershey letters") extant at the time. Appendix, pp. 23-26.

Under the circumstances, the Court should decide the important question whether petitioner's Order to Report for an Armed Forces Physical Examination was punishment, see *Kennedy v. Mendoza-Martinez,* 372 U.S. 144 (1963), and, if so, whether this procedure violated the due process clause of the Fifth Amendment and the provisions of the Sixth Amendment.

Certiorari should be granted to settle the important question whether petitioner's Order to Report for an

Armed Forces Physical Examination on the day after he wrote a note and returned his draft card to the local board is authorized in the Military Selective Service Act of 1967 or the Selective Service Regulations. Attorney for Petitioner is at a loss to discover any regulation in the Selective Service Regulations or any provision in the Military Selective Service Act authorizing an Executive Secretary of a board to issue such an Order to Report for an Armed Forces Physical Examination for the reason apparent here.

It is obvious, therefore, that there is a serious and unresolved statutory or constitutional issue present here which should be settled by this court in this case where a registrant has been sentenced to four years imprisonment under a very dubious administrative practice.

Absent provision in the law or regulations, the power exercised here was entirely at the discretion of the administrative person of the local board. Surely it is a type of administrative absolutism not congenial to our lawmaking traditions. *Kent v. Dulles,* 357 U.S. 116, 128-129. As this Court has just said in *Gutknecht v. United States,* No. 71, October Term, 1969, (January 19, 1970):

> "We search the Act in vain for any clues that Congress desired the Act to have punitive sanctions apart from the criminal prosecutions specifically authorized. Nor do we read it as granting personal privileges which may be forfeited for transgressions which affront the local board."

CONCLUSION

For the reasons stated above, certiorari should be granted.

Respectfully submitted,

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April 28, 1970

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 17981

UNITED STATES OF AMERICA
v.
ROBERT DAVID ZMUDA,
Appellant.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA

Argued January 6, 1970

Before BIGGS, ALDISERT and STAHL,[1] *Circuit Judges*

OPINION OF THE COURT
(Filed March 10, 1970)

ALDISERT, *Circuit Judge.*

Appellant was convicted of failing to report for his selective service physical examination and for refusing induction into the armed services.[2] He received concurrent three year sentences for each offense. He argues that his convictions were invalid because he was denied due process in the consideration of his claim for exemption by the selective service system, and contends that his order for accelerated induction was without statutory authority.

1. Judge Stahl participated in the hearing and decision of this case but died before the opinion of the court was filed.

2. 50 U.S.C.A. App. § 462(a)

Zmuda, a selective service registrant with an Allegheny County, Pennsylvania, local board, had, on July 27, 1967, claimed conscientious objector status. The claim was denied by the local board and in September, 1967 he received a I-A Classification. With the Notice of Classification and under separate cover, the local board advised him of his right to request a personal appearance before the board and to appeal the board's decision. Zmuda did not respond.

Two months later the local board, advised that appellant had enrolled as a full-time college student, reclassified him II-S as a registrant deferred because of academic study. Notice of this reclassification was given Zmuda together with written advice of personal appearance and appeal rights. In December, 1967 the board was notified that appellant had withdrawn from school and he was returned to the I-A Classification. Zmuda was informed of the Board's action and was again apprised of his entitlement to a personal appearance and appeal.

Approximately four months after this return to I-A status, Zmuda returned his Notice of Classification to the board with an accompanying letter. In the letter the appellant protested that, "I see no reason why a C.O. was not given to me," and concluded: "Now you come and get me." On May 27, 1968, Zmuda was ordered to report for a physical examination on June 19. When he failed to report for the exam, he was declared delinquent under the provisions of 32 C.F.R. 1942.4 for failure to perform a duty "required of him under the Selective Service law," 32 C.F.R. 1628.16. He was directed to report to the local board "in person or by mail" and was cautioned that willful failure to comply would consti-

tute a violation of the Universal Military Training and Service Act. He failed to respond and was ordered for induction on August 22, 1968. He acknowledged receipt of the order with a handwritten note which read: "As I have stated in the past, I will not cooperate with you in any way. I see no reason why a C.O. was not given to me." Zmuda failed to report for induction on the day designated. He was convicted for failure to report both for the physical examination and for induction and this appeal followed.

Based on the Supreme Court's recent decision in *Gutknecht v United States,* — U.S. — (1970), 38 L.W. 4075 (Jan. 20, 1970), we have concluded that appellant's conviction for failure to report for induction cannot stand. In *Gutknecht,* the Court held that the Selective Service System is without statutory authority to order the accelerated induction of a registrant on the basis of his "delinquency" status.

Our review of the record in this case convinces us that appellant's order for induction came when it did solely because of his failure to report for his armed forces physical examination. First, the directive from the state director to the local board, dated July 10, 1968, clearly indicates that appellant's accelerated induction resulted solely from his being declared a delinquent. That directive states: "On June 19, 1968, the registrant [Zmuda] failed to report for an armed forces physical examination, therefore he should be declared to be delinquent and processed for induction according to Local Board Advice E-1-3."

Paragraph 3 of Local Board Advice E-1 ("Delinquents") provides seriatim for: (1) declaration of de-

linquency; (2) notification to the registrant; (3) registration of delinquency; and (4) call for induction. Moreover, by brief and oral argument to this court, the government virtually concedes that the induction was part of "the implementation of the delinquency regulations." Consequently, appellant's conviction for failure to comply with the invalid induction order must be reversed.

As noted previously, however, appellant was also convicted on a separate count of failing to report for his physical examination. In defense, appellant contends that the denial of his conscientious objector claim was punitively motivated and erroneous — having no basis in fact — and that the procedures that resulted in his I-A classification violated due process of law.

First and foremost, it must be emphasized that the alleged invalidity of appellant's classification is not available as a defense to a prosecution for failing to report for a physical examination. The validity of a I-A classification has no relevance to the registrant's obligation to undergo an examination to determine his physical eligibility to serve in the armed forces. *McKart v. United States,* 395 U.S. 185 (1969). Should the result of the examination reveal that the registrant is physically ineligible to serve, then his I-A classification would obviously be changed.

Even if Zmuda's classification had any bearing on his duty to submit to physical examination, we confess extreme difficulty in grasping the contention that a "punitive" classification or reclassification was in-

volved here.[3] There is no evidentiary support for the assertion that the local board's initial rejection of the appellant's conscientious objector claim was prompted by punitive motivations. Clearly, there was no question of any delinquency on Zmuda's part at that time. Furthermore, the return to I-A status following Zmuda's brief II-S student deferment was nothing more than an administrative restoration of the original I-A classification.

Stripping the surplusage from the various arguments advanced on this point, the appellant's complaint is simply that the local board had no basis in fact for rejecting his conscientious objector claim. But in the posture of the record before us, we are precluded from inquiring as to whether there was a "basis in fact"[4] for the 1-A classification, or, conversely, whether Zmuda met his burden of proof in establishing a conscientious objector exemption.[5] We are placed in this position because appellant failed to avail himself of the review procedures available within the selective service system

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3. We are thus not confronted with questions of delinquency reclassification such as were presented in *Gutknecht, supra,* or *Breen v. Selective Service Local Board No. 16,* — U.S. — (Jan. 26, 1970). These cases clearly invalidate selective service reclassifications or inductions based solely on a registrant's "delinquency" status.

4. "It is by now axiomatic in Selective Service cases that the standard of judicial review of classification by a local board is whether there is basis in fact for the board's classification." *United States v. Carroll,* 398 F.2d at 653 (3 Cir. 1968).

5. See *United States v. Brown,* — F.2d — (3 Cir. 1970).

for the rectification of what a registrant believes to be an improper classification.[6]

The appropriate regulations provide for both a personal appearance before the local board and recourse to the appeal board where a registrant disagrees with his classification. 32 C.F.R. § 1626.2. Zmuda received a specific "Notice of Right to Personal Appearance and Appeal" in which his attention was directed to his "right to ask for a personal appearance of appeal within 30 days prescribed on the reverse side of [the] Notice of Classification."[7] Appellant was familiar with these

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6. No such similar requirement is presented in the appellant's attack on his accelerated induction since the declaration of delinquency is not a "classification" from which an administrative appeal is required. See *Gutknecht, supra.*

7. This notice provides in part:

If this classification is by a local board, you may, within 30 days after the mailing of this notice, file a written request for a personal appearance before the local board (unless this classification has been determined upon such personal appearance). Following such personal appearance you may file a written notice of appeal from the local board's classification within the applicable period mentioned in the next paragraph after the date of mailing of the new notice of classification. If you do not wish a personal appearance but do want to appeal your case, you may do so by making such an appeal in writing, to your local board, within the specified time.

Appeal from classification by local board may be taken by filing written notice of appeal with your local board within one of the following periods after the date of mailing of this notice:

(1) 30 days if the registrant is located in the

rights and he candidly stated at the trial that he did not take advantage of them because "from the beginning I have always felt that I was entitled to this C.O. and that it should have been given to me, and therefore I did not want to 'play the game' in appealing, so to speak."

Under such circumstances, the failures to exhaust these administrative remedies prevents the assertion of an erroneous classification as a defense to a criminal prosecution. *United States v. Grundy,* 398 F.2d 744 (3 Cir. 1968); *Lockhart v. United States,* — F.2d — (9 Cir.

United States, its territories, possessions, Canada, Cuba, or Mexico OR;

(2) 60 days if the registrant is located in a foreign country other than Canada, Cuba or Mexico.

You may file with your local board a written request that the appeal be submitted to the appeal board having jurisdiction over the area in which your principal place of employment or current place of residence is located.

If an appeal has been taken, and one or more members of the appeal board dissented from such classification, you may file a written notice of appeal to the President with your local board within 30 DAYS after the mailing of this notice.

Your Government Appeal Agent, attached to your selective service local board, is available to advise you regarding your rights and liabilities under the selective service law.

Your Selective Service Number, shown on the reverse side, should appear on all communications with your local board. Sign this form immediately upon receipt.

FOR INFORMATION AND ADVICE, GO TO ANY LOCAL BOARD.

Dec. 18, 1969). Appellant seems to be aware of this, but asserts that exhaustion of administrative remedies should not be applied dogmatically in all cases, and that in his particular case he should have been relieved of this responsibility.

Whatever uncertainties existed in the state of the law relating to the exhaustion requirement prior to *McKart v. United States, supra,* that case has now delineated, with some specificity, the type of selective service proceedings where exhaustion of administrative remedies may or may not be mandatory. The precise holding in *McKart* was that exhaustion was not required in a claim for exemption as a sole surviving son because resolution of the claim called for a statutory legal interpretation not based on factual determinations or the exercise of discretion by the selective service system. Significantly, the Court made reference to conscientious objector claims as representative of another type of exemption requiring the full panoply of administrative consideration:

> conscientious objector claims . . . would appear to be examples of questions requiring the application of expertise or the exercise of discretion. In such cases, the Selective Service System and the courts may have a stronger interest in having the question decided in the first instance by the local board and then by the appeal board, which considers the question anew. 32 C.F.R. § 1626.26. The Selective Service System is empowered by Congress to make such discretionary determinations and only the local and appeal boards have the necessary expertise.

395 U.S. at 198, n. 16.

We are compelled to conclude that Zmuda's conscious and deliberate choice to reject any recourse to the administrative review available within the Selective Service System constitutes a complete bar to any consideration of his classification here.[8]

We recognize that some may regard the application of the exhaustion requirement as an insensitive and inflexible formalism — a judicial preoccupation with form over substance. It should be remembered, however, that nothing is more basic to our jurisprudence than the constant application of procedural rules. It is what Mr. Justice Brandeis called "due process in the primary sense." *Brinkerhoss-Faris Co. v. Hill,* 281 U.S. 673, 681 (1930). And when Congress has designated an administrative agency as the initial forum for the adjudication of contested rights, only a clear demonstration that recourse to the agency would be futile, self-defeating or judicially wasteful will justify the abandonment of the exhaustion requirement. No such demonstration has been made here. The appellant deliberately refused to utilize the administrative apparatus available to rectify what he considered unjust. He will not now be heard to complain of the denial of due process from a system he chose to ignore.

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8. In ruling as we do on the exhaustion question, we do not reach the additional points raised by the appellant concerning the production of local board records, and the testimony of board members, all of which would only be relevant if the issue of appellant's classification were reviewable. We also note that appellant's original contention in written brief that the local board was improperly constituted was abandoned at oral argument.

Accordingly, the conviction for failure to report for induction will be reversed; the conviction for failure to report for an armed forces physical examination will be affirmed.[9]

A True Copy:

Teste:

Clerk of the United States Court of Appeals for the Third Circuit.

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9. In light of the Supreme Court's decision in *Benton v. Maryland*, 395 U.S. 784 (1968), concerning the reviewability of concurrent sentences where a conviction is valid on one count, we feel both compelled and justified in ruling as we do.

Military Selective Service Act of 1967

Sec. 12. *Penalties.*—(a) Any member of the Selective Service System or any other person charged as herein provided with the duty of carrying out any of the provisions given thereunder, who shall knowingly fail or neglect to perform such duty, and any person charged with such duty, or having and exercising any authority under said title, rules, regulations, or directions who shall knowingly make, or be a party to the making, of any false, improper, or incorrect registration, classification, physical or mental examination, deferment, induction, enrollment, or muster, and any person who shall knowingly make, or be a party to the making of, any false statement or certificate regarding or bearing upon a classification or in support of any request for a particular classification, for service under the provisions of this title, or rules, regulations, or directions made pursuant thereto, or who otherwise evades or refuses registration or service in the armed forces or any of the requirements of this title, or who knowingly counsels, aids, or abets another to refuse or evade registration or service in the armed forces or any of the requirements of this title, or of said rules, regulations, or directions, or who in any manner shall knowingly fail or neglect or refuse to perform any duty required of him under or in the execution of this title, or rules, regulations, or directions made pursuant to this title, or any person or persons who shall knowingly hinder or interfere or attempt to do so in any way, by force or violence or otherwise, with the administration of this title or the rules or regulations made pursuant thereto, or who conspires to commit any one

or more of such offenses, shall, upon conviction in any district court of the United States of competent jurisdiction, be punished by imprisonment for not more than five years or a fine of not more than $10,000, or by both such fine and imprisonment, or if subject to military or naval law may be tried by court martial, and, on conviction, shall suffer such punishment as a court martial may direct. No person shall be tried by court martial in any case arising under this title unless such person has been actually inducted for the training and service prescribed under this title or unless he is subject to trial by court martial under laws in force prior to the enactment of this title. Precedence shall be given by courts to the trial of cases on the docket for immediate hearing, and an appeal from the decision or decree of any United States district court or United States court of appeals shall take precedence over all other cases pending before the court to which the case has been referred.

Selective Service Regulation

ARMED FORCES PHYSICAL EXAMINATION

1628.10 *Who Will Be Examined.*—Every registrant, before he is ordered to report for induction, or ordered to perform civilian work contributing to the maintenance of the national health, safety, or interest, shall be given an armed forces physical examination under the provisions of this part, except that a registrant who is a delinquent and a registrant who has volunteered for induction may be ordered to report for induction without being given an armed forces physical examination.

Texts of Letter and Memorandum on the Draft

Special to The New York Times

WASHINGTON, *Nov. 8—Following is the text of a letter, dated Oct. 26, to all members of the Selective Service system from the director of Selective Service Lieut. Gen. Lewis B. Hershey, and of a memorandum dated Oct. 24, from General Hershey on draft cards:*

THE LETTER

The basic purpose and the objective of the Selective Service system is the survival of the United States. The principal means used to that end is the military obligation placed by law upon all males of specified age groups. The complexities of the means of assuring survival are recognized by the broad authority for deferment from military service in the national health safety, or interest.

Important facts, too often forgotten or ignored, are that the military obligation for liable age groups is universal and that defendants are given only when they serve the national interest. It is obvious that any action that violates the military selective service act or the regulations, or the related processes cannot be in the national interest.

It follows that those who violate them should be denied deferment in the national interest. It also follows that illegal activity which interferes with recruiting or causes refusal of duty in the military or naval forces could not by any stretch of the imagination be construed as being in support of the national interest.

The Selective Service system has always recognized that it was created to provide registrants for the armed forces, rather than to secure their punishment for disobdience of the act and regulations. There occasionally will be registrants, however, who will refuse to comply with their legal responsibilities, or who will fail to report as ordered, or refuse to be inducted. For these registrants, prosecution in the courts of the United States must follow with promptness and effectiveness. All members of the Selective Service system must give every possible assistance to every law enforcement agency and especially to United States attorneys.

It is to be hoped that misguided registrants will recognize the long-range significance of accepting their obligations now, rather than hereafter regretting their actions performed under unfortunate influences of misdirected emotions, or possibly honest but wholly illegal advice, or even completely vicious efforts to cripple, if not to destroy, the unity vital to the existence of a nation and the preservation of the liberties of each of our citizens.

Demonstrations, when they become illegal, have produced and will continue to produce much evidence that relates to the basis for classification and, in some instances, even to violation of the act and regulations. Any material of this nature received in national headquarters or any other segment of the system should be sent to state directors for forwarding to appropriate local boards for their consideration.

A local board, upon receipt of this information, may reopen the classification of the registrant, classify him

anew, and if evidence of violation of the act and regulations is established, also to declare the registrant to be a delinquent and to process him accordingly. This should include all registrants with remaining liability up to 35 years of age.

If the United States Attorney should desire to prosecute before the local board has ordered the registrant for induction, full cooperation will be reported to the state director and by him to national headquarters.

Evidence received from any source indicating efforts by nonregistrants to prevent induction or in any way interfere illegally with the operation of the Military Selective Service Act or with recruiting or its related processes, will be reported in as great detail as facts are available to state headquarters and national headquarters so that they may be made available to United States attorneys.

Registrants presently in classes IV-F or I-Y who have already been reported for delinquency, if they are found still to be delinquent, should again be ordered to report for physical examination to ascertain whether they may be acceptable in the light of current circumstances.

All elements of the Selective Service system are urged to expedite responsive classification and the processing of delinquents to the greatest possible extent consistent with sound procedure.

MEMORANDUM

Subject: Disposition of Abandoned or Mutilated Registration Certificate and Notices of Classification

1. Whenever an abandoned or mutilated registration certificate or current notice of classification reaches a local board, and the card was originally issued to a registrant by some other board, it should be forwarded to the state director of selective service, who will forward it to the appropriate local board if within the state, or the appropriate state director if the board of origin is outside the state.

2. Whenever a local board receives an abandoned or mutilated registration certificate or current notice of classification which had been issued to one of its own registrants, the following action is recommended:

(A) Declare the registrant to be delinquent for failure to have the card in his possession.

(B) Reclassify the registrant into a class available for service as a delinquent.

(C) At the expiration of the time for taking an appeal, if no appeal has been taken, and the delinquency has not been removed, order the registrant to report for induction or for civilian work in lieu of induction if in Class I-O, as a delinquent, or in the board's discretion in a flagrant case, report him to the United States attorney for prosecution.

(D) If appeal is taken and the registrant is retained in a class available for service by the board, and the delinquency has not been removed, order the registrant to report for induction or for civilian work in lieu of induction if in Class I-O, as a delinquent, or in the board's discretion in a flagrant case, report him to the United States Attorney for prosecution.

In the Supreme Court of the United States

OCTOBER TERM, 1969

No. 1539

ROBERT DAVID ZMUDA, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

After a jury trial in the United States District Court for the Western District of Pennsylvania, petitioner, a Selective Service registrant, was convicted of failing to report for an Armed Forces physical examination, in violation of 50 U.S.C. App. 462.[1] On March 20, 1969, he was sentenced to four years' imprisonment. The court of appeals affirmed (Pet. App. 11-20).

[1] Petitioner was charged and convicted on another count—for failing to report for induction. Basing its decision on *Gutknecht* v. *United States*, 396 U.S. 295, the court of appeals reversed as to that count, finding that petitioner's induction had been accelerated because of his status as a delinquent registrant (Pet. App. 13). Since the sentences on the two counts were concurrent, the court below, applying this Court's holding in *Benton* v. *Maryland*, 395 U.S. 784, concluded that it was "both compelled and justified" in affirming the conviction on the other count (Pet. App. 20, n. 9). Petitioner raises no question regarding the propriety of applying the "concurrent sentence" doctrine in the instant case.

Petitioner registered for the draft in 1967, when he was 18 years old. His claim that he held conscientious scruples against war was rejected and he was classified I–A (T. 26, 47).[2] He did not take an administrative appeal from this classification. Nor, after a brief tenure as a college student, did he appeal his subsequent I–A classification (T. 29, 32, 34–35, 40–41, 115–116).

On May 23, petitioner's local board sent him a questionnaire in preparation for a planned Armed Forces physical examination (SS File 31; T. 42–43). On May 27, 1968, petitioner returned the uncompleted questionnaire, accompanied by his notice of classification and a covering note in which he expressed his readiness to be imprisoned for non-compliance with the Selective Service laws (Pet. 5; T. 37–38, 43–44, 116). On May 28, one day later, the clerk of the local board sent him a notice to report for his physical examination on June 19, 1968 (SS File 35; T. 41, 78–79). On May 31, 1968, petitioner sent this notice back to the clerk, accompanied by a poem which expressed his intent not to comply with the order to take the examination (T. 44–45). He did not report for examination on the date he had been ordered to do so (T. 44, 85, 117). He subsequently failed to report for induction, and the instant prosecution ensued.

Petitioner seeks to excuse his acknowledged failure to report for a physical examination (T. 117) by

[2] "T." refers to the one-volume trial transcript which we are presently lodging with the Clerk of this Court. "SS File" refers to petitioner's Selective Service file, which is included in petitioner's appendix already on file with the Clerk of this Court.

claiming that the order to take the examination was issued by the clerk of his local board in retaliation for his "provocative note" and the return of his notice of classification, and that she was not authorized to issue such an order, at least in those circumstances (Pet. 5-6, 8-9). That contention, the only one made by petitioner, has no factual basis.

Petitioner had previously been classified I-A. As the clerk explained, she and the other clerks kept a record of those registrants with I-A classifications, and, unless informed to the contrary, sent an order to take a physical examination, as a routine matter, whenever a particular registrant's "turn" to do so arrived (T. 81). She testified that petitioner was ordered to take the ordered examination "in turn" (T. 78-79). There is no indication of any effort at retaliation by the clerk or of the advancement of the date of the examination. At trial the clerk testified that she did not know petitioner and believed that she had never seen him prior to trial (T. 45). That the physical examination was anticipated is shown by the fact that, four days before the clerk received petitioner's note, she had mailed him the pre-physical questionnaire. At trial there was no dispute that by mailing the examination order the clerk was performing "a ministerial and routine function" delegated to her by the board. The trial court so instructed and the defense did not object (T. 157, 159). Moreover, the courts of appeals have consistently recognized that local board clerks, by virtue of their office, have the authority to perform such a function, and this Court has uniformly declined to review this issue. *United States* v. *Stark*, 418 F. 2d 901 (C.A. 9), certi-

orari denied, 397 U.S. 969; *United States* v. *Hilgeneck,* 418 F. 2d 233 (C.A. 6), certiorari denied, 397 U.S. 923; *United States* v. *Powers,* 413 F. 2d 834 (C.A. 1), certiorari denied, 396 U.S. 923; *United States* v. *Crowley,* 405 F. 2d 400, 402–403 (C.A. 4), certiorari denied, 394 U.S. 904.

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

JUNE 1970.

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